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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 848

SWIFT & COMPANY, INC. and ARMOUR AND COMPANY,

Petitioners,

v.

DON J. WICKHAM, Commissioner of Agriculture & Markets of the State of New York,

Respondent.

BRIEF IN OPPOSITION

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Opinions Below

The opinion of the District Court is reported in 230 F. Supp. 398 (S.D.N.Y.). The opinion of the Circuit Court of Appeal is reported in 364 F. 2d 241 (2d Cir.).

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether the Poultry Products Inspection Act pre-empted the field so as to preclude New York's weight

labeling enactments with respect to poultry inspected under that Act?

2. Whether on the record presented here the Poultry Products Inspection Act directly conflicts with the interpretation of New York's Agriculture & Markets Law § 193.3?

Statutes Involved

The Poultry Products Inspection Act; Sections 81.1, 81.3, 81.7, 81.125, 81.127, 81.130 of 7 C.F.R.: Section 193 of the Agriculture and Markets Law of the State of New York; and Regulations 221.40 and 221.9C of the State of New York.

Statement of the Case

Petitioners pack and ship frozen stuffed turkeys to the State of New York from their processing plants in Minnesota and Wisconsin. Upon entry into New York State they are sold to retailers who in turn offer them for sale to the general public.

Section 193.3 of the New York Agriculture and Markets Law provides that

> "All food and food products offered for sale at retail and not in containers shall be sold or offered for sale by *net weight*, standard measure or numerical count under such regulations as may be prescribed by the commissioner." (emphasis supplied)

The respondent commissioner's interpretation of "net weight" requires that frozen stuffed turkeys, offered for sale in New York to bear labels showing separately (a) the weight of the turkey without the stuffing and (b) the total "net weight" of the bird and the stuffing.

The federal Poultry Products Inspection Act requires, *inter alia*

> "[A] statement of ingredients if fabricated from two or more ingredients including a declaration as to artificial flavor, colors, or preservatives, if any, [any] the *net weight or other appropriate measure of the contents.*" 21 U.S.C. 457(a) (emphasis supplied)

The regulations of the Secretary of Agriculture provide that such labels must receive prior approval before they may be used. 7 C.F.R. 81.126, 81.127. Accordingly, the petitioners submitted to the federal agency the sample labels listing the two weights—the weight of the unstuffed bird and the total net weight of the bird and stuffing. These labels were disapproved by the head of the federal Poultry Products Section. Among the several reasons set forth by the subordinate officer in a letter for disapproving these labels was that the federal Poultry Act is interpreted as requiring a single label showing the net weight of the entire poultry product, the turkey plus stuffing. This initial holding by that subordinate, prevented petitioners from complying with New York's requirements and is the sole basis for their action seeking to declare New York's weight statute unconstitutional.

Although the fact that the federal Poultry Act permits a full administrative hearing to question the disapproval of a label, 21 U.S.C. 457(b), petitioners chose not to take advantage of this procedure. Instead, they relied only upon the aforementioned letter of disapproval and commenced this action in the United States District Court for the Southern District of New York.

Following a three-day trial before a statutory three-judge court, petitioners' complaint was dismissed. The court unanimously rejected petitioners' claim under the commerce clause and held that their Fourteenth Amend-

ment contentions were wholly without substance. After analyzing the federal statute in detail the court found no congressional purpose to preempt the field of labelling and that the state regulation did not create an irreconcilable conflict with the federal enactments. Moreover, the court said that where an administrative procedure is available, a party may not simply rely upon a letter from a subordinate federal official to avoid compliance with a state regulation.

Finally, the three-judge court expressed concern that there were serious doubts that a claim of preemption coupled with insubstantial federal constitutional questions necessitated a three-judge court. In order to avoid the possibility of an invalid order the Court directed that the judgment dismissing the complaint be entered in the name of the three-judge court and in the name of the single district judge.

Petitioners thereafter appealed directly to this Court but the appeal was dismissed on the ground that this case did not require a statutory three-judge court. In reaching the conclusion this Court specifically held that petitioners' claims under the commerce clause and the Fourteenth Amendment were insubstantial. *Swift & Co.* v. *Wickham*, 382 U. S. 111.

Thereafter petitioners, who had preserved their appeal to the Court of Appeals for the Second Circuit, prosecuted the appeal. That court unanimously held there was no basis for petitioners' preemption claim and found no irreconcilable conflict between the federal and state weight regulations on the record before it. In passing, the Court of Appeals chastised petitioners for failing to discharge their burden of establishing conflict since they had failed to pursue their administrative procedures under the federal Poultry Act. *Swift & Co.* v. *Wickham*, 364 F. 2d 241 (2nd Cir.).

POINT I

The Poultry Products Inspection Act does not preempt the field so as to prevent New York's regulation of labels, weights and measures of such items inspected under that Act.

Petitioners' initial ground presented for seeking the granting of certiorari is misleading. They contend that this Court has never determined a case involving regulation by the states of the *same* labels initially approved of by a federal agency where such prior approval is provided for by the Congress. This claim is patently erroneous. See *McDermott* v. *Wisconsin*, 228 U. S. 115. In any event, New York clearly does not seek to regulate the same label as approved by the Secretary of Agriculture. Rather, New York, under its police powers, for the protection of its consumers, simply requires more comprehensive label disclosures. Certainly, this proposition is neither so novel nor startling to invoke the certiorari jurisdiction of this Court.

In *Florida Avocado Growers v. Paul*, 373 U. S. 132, this Court held that the Secretary of Agriculture's authority to promulate regulations governing the marketing of avocados in interstate commerce did not prevent California from imposing more stringent standards for the sale of avocados at retail in that state where such local regulation was for the protection of its consumers. *Id.* at 144-145. There this Court pertinently observed that "congressional regulation of one end of the stream of commerce does not, *ipso facto*, oust all state regulation at the other end." *Id.* at 145.

Similarly, in *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148, this Court noted that it is "permissible under all the authorities" for a state to impose upon imported foodstuffs "a higher standard demanded . . . for its consumers." *Id.* at 162.

McDermott v. *Wisconsin*, 228 U. S. 115, cited by petitioners is not to the contrary. In *McDermott* the state enactment permitted sale of the articles there involved only when labeled according to the state law. Wisconsin's regulations, unlike those here, would have required the removal of the federally approved label. More relevant here is this Court's subsequent decision in *Corn Products Refining Co.* v. *Eddy*, 249 U. S. 427, which distinguished the *McDermott* decision, *supra*, and held that the state has the right to require information on the label supplemental to that furnished under the federal act. See also *Savage* v. *Jones*, 225 U. S. 501; *Armour & Co.* v. *North Dakota*, 240 U. S. 510.

The courts below have properly held, after a careful review of the legislative history of the federal Poultry Act and from the nature of the subject matter to be regulated, that there was no intention on the part of the Congress to construct a uniform national standard requiring the preemption of the instant state regulation concerning the disclosure on labels of the net weight of poultry products. The petitioners accordingly have neither overcome the holding below nor presented a valid basis for invoking this Court's certiorari jurisdiction.

POINT II

There is no direct conflict between federal and New York law. Moreover, as the courts below have held, since petitioners have failed to exhaust the administrative procedures available to them under the federal Poultry Products Inspection Act any claim by them with respect to an alleged conflict, on the record presented here, is fatally premature.

The federal Poultry Products Inspection Act simply requires that an inspected bird be labeled with its "net weight or other appropriate measure of the contents . . ." 21 U.S.C. 457(a) while the regulations contain no prohibi-

tion against a dual weight label (7 C.F.R. 81.125-81.156). Accordingly, the District Court below properly observed that there is no showing on the record here that the United States would prohibit the petitioners "from affixing an *additional* label that will meet New York's requirements." *Swift & Co.* v. *Wickham*, 230 F. Supp. 398, 408 (S.D.N.Y.) (emphasis supplied). The only basis for petitioners' claim of conflict is a communication by a subordinate federal official which rejected the particular labels submitted by petitioners on their application for label approval. This initial rejection by the subordinate official obviously cannot be construed, in any sense, as a broad ruling "that any supplementary labelling of weight in addition to that satisfying the [Agriculture] Department would be unlawful." *Id.* at 408. It should be categorically stated that the District Court and the Court of Appeals found that the various reasons advanced by the federal subordinate officer for denial of petitioners' label applications lacked any factual basis.

The courts below thus properly held that the federal law and regulation do not conflict with the state enactments.

Petitioners' claim of conflict, as just noted, rests entirely upon a letter composed by a lower echelon official of the United States Department of Agrictulture. Yet the petitioners deliberately avoided their statutory right to a full administrative hearing provided for in the federal Poultry Act. 21 U.S.C. 457(b). At such a hearing all of the interested parties (including the State of New York) could have presented their contentions to the Agriculture Department with a resultant final authoritative interpretation of the federal enactments by such federal agency. Indeed, petitioners' good faith is in issue here since they simply "accepted", without more, the inferior officer's determination. To ask the federal courts to enjoin New York from enforcing its laws without such final federal administrative determination flies in the face of this Court's holdings in several cases

that it would refuse to permit premature judicial determination where there is an available administrative procedure present, in the first instance, to adjudicate conflicting claims of state and federal agencies. *Federal Power Commission* v. *Arkansas Power & Light Co.*, 330 U. S. 802, *reversing per curiam*, 156 F. 2d 821 (D. C. Cir.).

The petitioners' contention here that as a result of the decision below, the Secretary of Agriculture must now alter his practice of prior approval for labelling of poultry, is without merit. The Court of Appeals did not, in any manner, as petitioners suggest, hold or otherwise imply that the Secretary "must defer" to individual state labelling regulations. The Court simply held on the record before it that there was no showing of an irreconcilable conflict here. And, as noted above, the Court additionally held that where an otherwise valid state law is involved, the applicant, in the face of a preliminary label disapproval by a subordinate administrative official, should exhaust his available administrative remedy provided for in the instant federal act (21 U.S.C. 457[b]) before commencing an action in the District Court alleging an "irreconcilable" conflict between the federal and state enactments. This hardly requires the conclusion suggested here by petitioners.

Finally, petitioners allege that in accordance with the decision below, they have held a series of meetings with the officials of the federal agency involved here while New York has failed to do so. It should be noted, however, that the respondent by letter dated December 19, 1966 communicated with the United States Department of Agriculture (in the absence of the receipt of any communication from that Bureau), in order to arrange a conference to resolve any outstanding policy considerations. Irrespective of whether the fact that the federal and state agencies have not yet met is a ground for invoking this Court's certiorari jurisdiction, we gravely question whether petitioners' efforts comply

with the Court of Appeals' misgivings concerning petitioners' failure to request a full administrative hearing pursuant to 21 U.S.C. 457(b). The proper procedure to be followed by petitioners is simply for them to refile the label application conforming to New York State's requirements and in the event of disapproval, all the interested parties including New York should participate in a full administrative review and a satisfactory solution achieved.

This Court should accordingly refrain from exercising its certiorari jurisdiction here.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should not be granted.

Dated: New York, New York, January 10, 1967.

Respectfully submitted,

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REPLY BRIEF

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

POINT I

This case presents a question which has never previously been determined by this Court.

In its Brief in Opposition to the Petition for Certiorari herein, Respondent labels as "patently erroneous" Petitioner's claim that this Court has never determined the question of pre-emption where the federal statute involved provides for prior approval of labels. In support of this contention, Respondent relies upon *McDermott* v. *Wisconsin*, 228 U. S. 115. Further along in its argument Respondent also cites *Corn Products Refining Company* v. *Eddy*, 249 U. S. 427, and *Savage* v. *Jones*, 225 U. S. 501. All of these cases arose under the Food and Drugs Act of 1906, 34 Stat. 768. That statute contained very limited regulation of labels. Indeed, this Court has not been called upon to

rule on any questions of pre-emption with respect to labelling under the Federal Food, Drug and Cosmetic Act, 21 U. S. C. 301 *et seq.*, 52 Stat. 1049, which contains very extensive label regulation. However, even under the latter Act, with its comprehensive labelling provisions, a shipper is free to send his product into the channels of commerce bearing any label of his choice. He may be subjecting himself to the remedies of seizure, prosecution or injunction if his label is in violation of the law, but these sanctions come into play only after the product has been introduced into interstate commerce.

On the other hand, under the Poultry Products Inspection Act, 21 U. S. C. 451 *et seq.*, 71 Stat. 441, which is involved in this litigation, no product may leave an establishment under the jurisdiction of the Secretary of Agriculture unless its label has been approved in advance.

The distinction is one of substance, not merely of form. Whereas Congress has required the Food and Drug Administration to challenge labels *in use* which do not comply with the standards of the Food, Drug and Cosmetic Act, it has chosen to charge the Secretary of Agriculture with the responsibility of supervising the text of poultry labels *before they may be placed upon an inspected product in the first instance.* In so doing, Congress has reflected its intention that the Secretary of Agriculture shall have complete control of poultry labelling, which is inconsistent with any concurrent control on the part of the states.

POINT II

The issue of irreconcilable conflict between federal and state law is important in the administration of the Poultry Products Inspection Act and should be determined by this Court.

Each year a tremendous number of labels are submitted to the Department of Agriculture for approval for use under the Poultry Products Inspection Act or the Meat Inspection Act, 21 U. S. C. 71 *et seq.*, 34 Stat. 1206. The necessity to conduct administrative hearings and perhaps to engage in litigation in a United States Court of Appeals with respect to label determinations which are in accordance with long standing policy and with which applicants have no basic disagreement, as was the case herein, would reduce the administration of these two important consumer protection statutes to chaos. The affected industries and the Department of Agriculture itself have a right and an overriding need to have a definitive determination of this question in order that they might provide for the efficient conduct of their respective functions. Reference is made in Respondent's Brief in Opposition to a letter by Respondent to the United States Department of Agriculture, under date of December 19, 1966, seeking to arrange a conference to resolve outstanding policy considerations. Counsel is advised that the Department of Agriculture responded to that letter on January 6, 1967, indicating a willingness to meet in the near future. It is significant, however, that in neither communication was there any indication that either agency has any concrete proposal for discussion, nor that either agency is prepared to retreat in any respect from the position which it has steadfastly maintained up to the present time.

CONCLUSION

For the foregoing reasons, as well as those outlined in the Petition itself, this Petition for a writ of certiorari should be granted.

Dated: New York, New York, January 16, 1967.

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